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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1097

GEORGE S. YUMICH AND PHILIP STEVEN SHEAR, BY HIS FATHER AND NEXT FRIEND, SIDNEY SHEAR,
Petitioners,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

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CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

Respondent, City of Chicago, asks the court to deny the petition for a writ of certiorari filed by petitioners, George S. Yumich and Philip Steven Shear. Petitioners seek to raise an issue of statutory construction which was settled by the decision of this court in *Monroe* v. *Pape,* 365 U. S. 167 (1961).

CITATION TO OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Yumich* v. *Cotter,* 452 F. 2d 59 (7th Cir. 1971).

QUESTIONS PRESENTED.

1. Did Congress intend to impose vicarious liability on the municipality employing those who incur liability for money damages under § 1983 of the Civil Rights Act?

2. Is the scope of the liability imposed by § 1983 affected by changes in the law of tort immunities under state law?

3. Can the procedural provisions of § 1988 of the Civil Rights Act be used to impose vicarious liability on those Congress specifically declined to make liable under § 1983?

4. Does § 1983 of the Civil Rights Act define the scope of the remedy available to those who are deprived of their civil rights by persons acting under color of non-federal law or statute?

STATEMENT OF THE CASE.

Petitioners brought this action for damages against respondent, City of Chicago, thirteen Chicago police officers, Hilton Hotels Corporation, and two Hilton employees. Petitioners charged that Chicago police officers and Hilton employees had wrongfully evicted petitioners from the fifteenth floor of the Conrad Hilton Hotel, assaulted them in the course of the eviction, and deprived them of their civil rights.

The 1968 Democratic National Convention in Chicago adjourned on Thursday evening, August 28. Chicago's largest hotel, the Conrad Hilton, was filled with convention delegates, campaign workers, and others in Chicago for the convention. Units of the Illinois National Guard were stationed on Michigan Avenue in front of the hotel. The guardsmen had been sent to Chicago to help the police control violent anti-war demonstrations which had been occurring throughout the week of the convention.

About 3:00 a.m., the guardsmen stationed on Michigan Avenue noticed beer cans, ashtrays, and other items striking the sidewalk in front of the hotel's main entrance. The guardsmen stationed across the street pinpointed the source of the falling objects. They saw unidentified persons in Room 1506A throwing objects from the open windows.

The barrage of beer cans, ashtrays, and bottles continued for over two hours. About 5:00 a.m., the guardsmen asked the Chicago Police Department to investigate the situation on the fifteenth floor. After a conference between supervisory police officers and hotel personnel, four or five policemen and two hotel employees went up to the fifteenth floor. Later, another group of police officers and four National

Guardsmen arrived on the floor. At the request of the hotel employees, the police officers cleared Room 1506A and required the occupants of that room and those in the fifteenth floor corridor who were not registered in the hotel to descend to the main lobby. Eleven of the thirteen police officer defendants participated in the eviction of the fifteenth floor occupants.

Petitioners Yumich and Shear filed suit in the District Court alleging that the individual defendants had wrongfully evicted petitioners from the fifteenth floor, assaulted them in the course of the eviction, and otherwise deprived them of their civil rights. In Count I of their Amended Complaint, petitioners sought money damages against all defendants for violation of their civil rights. Petitioners sought to impose vicarious liability on the City of Chicago because the City employed the police officers who participated in the eviction. The City of Chicago moved for dismissal on Count I. The District Court, relying on *Monroe* v. *Pape*, 365 U. S. 167 (1961), ruled that Count I did not state a cause of action against the City and granted the City's motion. In the other two counts of their Amended Complaint, petitioners based their claim for damages against all defendants on Illinois law.

At the close of petitioners' case in chief, the trial court dismissed all the individual defendants. Although eleven of the thirteen defendant police officers admitted participation in the eviction of petitioners from the fifteenth floor, petitioners did not appeal the dismissal of the eleven police officers. With the agreement of petitioners' counsel, Hilton Hotels Corporation was dismissed as the remaining defendant in petitioners' civil rights claim. Petitioners' state-law claims against the City of Chicago and Hilton Hotels Corporation for wrongful eviction and unlawful assault were submitted to the jury. The jury found in

favor of both the City of Chicago and Hilton Hotels Corporation and against both petitioners.

Petitioners appealed the dismissal of the City from their civil rights claim and the judgment in favor of the City on their state-law tort claim. The Court of Appeals for the Seventh Circuit upheld the dismissal of the City of Chicago from petitioners' civil rights claim, but reversed the judgment on the state-law tort claim. The Court of Appeals held that petitioners were entitled to a new trial on their state-law claim against the City because the District Court had admitted too much evidence about the events which justified the eviction of petitioners from the fifteenth floor of the hotel.

REASONS FOR NOT GRANTING THE WRIT.

I.

THE DECISION OF THE COURT OF APPEALS HOLDING THAT § 1983 DOES NOT IMPOSE VICARIOUS LIABILITY ON THE CITY OF CHICAGO IS CONSISTENT WITH THE INTENT OF CONGRESS, THE STATUTORY INTERPRETATION OF § 1983 ANNOUNCED BY THIS COURT, AND WITH THE DECISIONS OF THE COURTS OF APPEALS IN THE OTHER CIRCUITS.

Petitioners sought damages against the City of Chicago under § 1983 of the Civil Rights Act on the theory of *respondeat superior*. Petitioners charged that they were deprived of their civil rights by thirteen Chicago police officers who wrongfully evicted petitioners from the fifteenth floor of the Hilton Hotel and assaulted them in the course of the eviction. Petitioners did not allege any corporate negligence or direct breach of duty on the part of the City of Chicago. Petitioners sought to impose indirect liability on the City because the police officer defendants were acting within the scope of their employment when they evicted petitioners from the fifteenth floor. The district court, relying on the interpretation of § 1983 announced by this court in *Monroe* v. *Pape*, 365 U. S. 167 (1961), ruled that petitioners' complaint did not state a cause of action for damages against the City of Chicago under § 1983.

Petitioners' § 1983 claim against the City of Chicago in this case is identical to the claim against the City which was involved in *Monroe* v. *Pape*. In that case, it was alleged that "the officers were employees of the City of Chicago . . . that the officers were agents of the City, acting in the course of their employment and engaged in the per-

formance of their duties. . . ." (Opinion of Mr. Justice Frankfurter at 204.) As in the present case, there was no allegation that the City of Chicago was directly involved in the wrongful conduct complained of or that the City was guilty of any act or omission which proximately caused injury to the plaintiffs. The court in *Monroe* decided, without dissent, that "Congress did not undertake to bring municipal corporations within the ambit of (§ 1983)." (*Monroe* v. *Pape* at 187.)

Petitioners assert that the decision of the Court of Appeals in this case is inconsistent with the decision of the Court of Appeals for the District of Columbia in *Carter* v. *Carlson*, 447 F. 2d 358 (D. C. Cir. 1971). However, a critical reading of the opinion of the court in *Carter* reveals that the asserted inconsistency is more imaginary than real. The court, in *Carter*, held that the District of Columbia may be sued for damages under § 1983 and alluded to the fact that the legal status of the District of Columbia is wholly different from that of a municipal corporation existing under state law. (*Carter* at 369-70.) The Court of Appeals in the present case was not concerned with the § 1983 liability of an entity created by federal law. Indeed, the municipality involved here is the same municipal corporation that was involved in *Monroe* v. *Pape*.

The *Carter* court advanced another independent reason for holding the District of Columbia liable under § 1983. In dicta unnecessary to the decision in the case, the court sought to put a new construction on the statutory language of § 1983. The court concluded that the holding in *Monroe* v. *Pape* was limited to the situation where the municipality was immune under local law from a suit for damages. (*Carter* at 369.) The *Carter* court ignored the fact that "municipal immunity under local law" was not mentioned, discussed, or considered in *Monroe* v. *Pape*. The *Monroe*

court specifically stated: "Nor do we reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals." (*Monroe*, at 191.[1])

The court in *Monroe* was concerned solely with a question of statutory construction: i.e. what was the meaning of the term "person" as used in § 1983 of the Civil Rights Act? After an extensive review of the legislative history of § 1983, the court stated (at 191):

> "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the act of April 20, 1871, was so antagonostic that we cannot believe that the word 'person' was used in this particular act to include them."

The statutory construction of § 1983 announced by the court in *Monroe* has been followed without exception in the lower federal courts. See, e.g., *Spiesel* v. *New York*, 239 F. Supp. 106, 107 (S. D. N. Y. 1964), *aff'd.* 342 F. 2d 800 (2nd Cir.), *cert. denied*, 382 U. S. 856, *reh. denied*, 382 U. S. 922; *U. S. ex rel. Gittlemacker* v. *County of Philadelphia*, 413 F. 2d 84, 86 (3rd Cir. 1969), *cert. denied*, 396 U. S. 1046; *U. S. ex rel. Lee* v. *Illinois*, 343 F. 2d 120 (7th Cir. 1965); *Davis* v. *United States*, 439 F. 2d 1118, 1119 (8th Cir. 1971); *Sheridan* v. *Williams*, 333 F. 2d 581, 582 (9th Cir. 1964); *Brown* v. *Town of Caliente*, 392 F. 2d 546, 548 (9th Cir. 1968).

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1. *Monroe* v. *Pape* was decided on February 20, 1961. The Illinois Supreme Court had abolished the doctrine of municipal immunity in 1959. *Molitor* v. *Kaneland Community Unit District*, 18 Ill. 2d 11 (1959); see *Andrews* v. *City of Chicago*, 37 Ill. 2d 309, 311 (1967). When the Civil Rights Act was passed in 1871, municipalities were not immune from tort liability for negligence under Illinois law. *Town of Waltham* v. *Kemper*, 55 Ill. 346 (1870); *Browning* v. *City of Springfield*, 17 Ill. 143 (1855).

With reference to the meaning of another part of § 1983, the *Monroe* court referred to its opinion in *Screws* v. *United States*, 325 U. S. 91 (1945). What was said in *Screws* concerning the interpretation of statutory language is relevant here (at 112-113):

> "The construction given . . . in the *Classic* case formulated a rule of law which has become the basis of federal enforcement in this important field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. . . . [T]he *Classic* case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the court have wisely remained flexible and subject to frequent reexamination. The meaning which the *Classic* case gave to the phrase 'under color of any law' involved only a construction of the statute. Hence, if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning . . . to meet the exigencies of each case coming before us."

II.

THE ONLY VALID ISSUE PRESENTED BY PETITIONERS IS WHETHER CONGRESS SHOULD AMEND § 1983 SO AS TO IMPOSE LIABILITY ON A MUNICIPALITY FOR THE ACTS OF ITS EMPLOYEES.

In their Amended Complaint, petitioners charged that the thirteen police officer defendants wrongfully evicted petitioners from the fifteenth floor of the hotel. Eleven of the police officer defendants admitted their participation in the eviction. Petitioners did not appeal the dismissal of the police officer defendants. In their petition for certiorari, petitioners advance the irrelevant argument that a munici-

pality should be liable when a § 1983 plaintiff is unable to identify the municipal employees involved in the alleged wrongful conduct. Petitioners claim they were unable to remember and identify the individual police officers who assaulted them. But their lapse of memory was of no consequence to their cause of action against the eleven police officers who admitted participation in the eviction. Under settled tort principles, if an assault had been committed in the course of a wrongful eviction, all those who combined together and participated in the wrongful eviction would be liable for the assault. Prosser, *Law of Torts* (2nd Ed. 1955) § 46.

Petitioners speculate that § 1983 plaintiffs are sometimes unable to identify the police officers because the officers have removed all identification insignia from their uniforms. In this case, there was no evidence or charge that the police officers who participated in the eviction removed their badges, obscured their name plates, or in any way tried to disguise their identities. Indeed, all of the officers who participated in the eviction were identified by the City in pre-trial discovery. The City supplied the names, badge numbers, and photographs of all Police Department personnel who had been assigned to the Hilton Hotel on the night of the eviction.

Petitioners have based their arguments on hypothetical situations unrelated to the facts presented here. In an attempt to present an issue not raised by the facts in this case, petitioners have made wild and unsubstantiated references to unknown assailants, police officers who remove their badges, and municipalities which refuse to identify their police officer employees. Section 1983, as it is presently written, does not impose liability on municipalities for the acts of their employees. Whether § 1983 should be amended is a question for Congress to decide. See *Ries* v. *Lynskey*, 452 F. 2d 172, 175 (7th Cir. 1971).

III.

PETITIONERS MADE NO CLAIM FOR EQUITABLE RELIEF IN THIS CASE. THERE IS NO INCONSISTENCY BETWEEN THE DECISION OF THE COURT OF APPEALS AND CASES INVOLVING CLAIMS FOR INJUNCTIVE OR DECLARATORY RELIEF AGAINST MUNICIPAL CORPORATIONS.

On the facts involved in this case, the issue presented by the petition for certiorari is whether Congress intended to impose vicarious liability on municipalities under § 1983 for the alleged wrongful conduct of police officers. We are not here concerned with the constitutional power of Congress to impose such liability on municipalities. Nor are we concerned with the desirability of such a result. Our sole concern is a question of statutory interpretation. On an almost identical set of facts, this court decided, without dissent, that the City of Chicago was not vicariously liable under § 1983 for the misdeeds of its employees. *Monroe* v. *Pape*, 365 U. S. 167 (1961).

Petitioners' reference to cases granting equitable relief against the municipal corporations is beside the point at issue here. We are not concerned with the power of the federal courts to enjoin a corporate violation of § 1983. As stated in the decision of the Court of Appeals: "Whatever may be the rationale for joining municipalities in § 1983 suits for injunction or declaratory judgment, usually along with individual officers and board members . . . Monroe conclusively established that a city was not made liable for damages by § 1983." *Yumich* v. *Cotter*, 452 F. 2d 59, 60 (7th Cir. 1971). In the cases upholding equitable relief against municipal corporations, the governmental entity enjoined was a direct participant in the wrong com-

plained of. See e.g., *Rolfe* v. *County Board of Education*, 391 F. 2d 77 (6th Cir. 1968) and *Smith* v. *Board of Education*, 365 F. 2d 770 (8th Cir. 1966).

IV.

§ 1983 OF THE CIVIL RIGHTS ACT DEFINES THE SCOPE OF A CAUSE OF ACTION FOR DAMAGES PREDICATED ON A VIOLATION OF RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Petitioners argue that they stated a claim for money damages against the City of Chicago on the basis of the Fourteenth Amendment, independent of an action under § 1983. But it is obvious from the title of the Civil Rights Act, "An Act to Enforce the Provisions of the Fourteenth Amendment of the Constitution of the United States, and for Other Purposes," that § 1983 was intended by Congress to define the scope of the remedies available to those who claimed a violation of their civil rights by persons acting under color of local law. *Monroe* v. *Pape*, 365 U. S. 167, 171 (1961). Petitioners' reference to the case of *Bivens* v. *Six Unknown Federal Narcotics Agents*, 29 L. Ed. 2d 619 (1971) is inapposite. *Bivens* involved a claim of civil rights deprivation committed by persons acting under color of federal law. Section 1983 does not purport to apply to wrongs committed pursuant to federal authority. Section 1983 applies only to actions done under color of local law and defines the scope of the available remedy.

CONCLUSION.

The Court of Appeals gave extensive consideration to all the issues properly involved in this case and adhered to the interpretation of § 1983 announced by this court in *Monroe* v. *Pape*. There is no real conflict between the decision in this case and the decision of the Court of Appeals for the District of Columbia. Respondent respectfully urges that the petition for a writ of certiorari be denied.

Respectfully submitted,

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